Supreme Court, U.S.
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No. 05-584

IN THE
Supreme Court of the United States

POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP.,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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REPLY BRIEF FOR PETITIONER

This Court has now twice called for a response from private plaintiffs and the State of California (collectively "the California parties") to address Powerex's core allegations that (1) the Ninth Circuit has created a conflict with three other circuits on what test determines the foreign-sovereign status of a corporation that is created by foreign statute, is wholly owned by a statutory agent of the foreign government, and is controlled by foreign government officials; and (2) Powerex is unquestionably a foreign sovereign when the correct test is applied. In highly unusual certiorari stage *amicus* filings, Canada and British Columbia also strongly urge this Court to grant certiorari. To all this the California parties have absolutely nothing to say. In both this case and No. 05-85, they bring up supposed procedural difficulties to obscure their lack of any defense for the Ninth Circuit's holding on the merits or any rebuttal to the clear conflict created by the Ninth Circuit.

The California parties' arguments against certiorari in this case are particularly misplaced. Having created the mootness issue in No. 05-85 – the case in which the Ninth Circuit created the problem – and having conceded that Powerex did nothing to facilitate the mooting of that case, *see* No. 05-85 Br. in Opp. at 3, 6, they now claim other miscellaneous vehicle problems that would have the effect of denying Powerex any realistic opportunity of ever obtaining this Court's review of the Ninth Circuit's erroneous holding that Powerex is not a foreign sovereign. Because these supposed "vehicle" problems are in fact illusory, this Court should grant certiorari in this case. Alternatively, the Court should grant and vacate No. 05-85 under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and then grant, vacate, and remand this case (and No. 05-1068) for the Ninth Circuit to reconsider Powerex's status as a foreign sovereign, particularly in light of the considered views of Canada and British Columbia. Should the Court be reluctant to take those steps at this

time, it should call for the views of the Solicitor General. As the confluence of these three certiorari petitions demonstrates, Powerex's sovereign status is clearly a recurring issue and one of significance in the bilateral relationship between the United States and Canada. The denial of Powerex's right to be treated as a foreign sovereign with the accompanying procedural protections of the FSIA means that Powerex will continue to be hauled into state courts in the Ninth Circuit (as it has in this case and No. 05-1068). Such treatment, in turn, raises significant issues between the United States and Canada, including the specter of bringing the United States into noncompliance with its obligations under the North American Free Trade Agreement. *See* Pet. 26-28.

THIS COURT HAS JURISDICTION TO DECIDE THE ISSUES PRESENTED BY THE PETITION

California asserts the existence of three obstacles to review by this Court, one discretionary and the other two jurisdictional. None provides a basis for denying the petition. First, this Court's practice of declining to review questions not passed on below is inapplicable here because the court of appeals reached the questions presented for review. Second, the court of appeals had appellate jurisdiction over this case because a district court's rejection of a claim of foreign-state status under the FSIA is appealable. Third, subsequent proceedings in state court have not mooted this case because California is appealing the dismissal of its suit.

A. The Court Of Appeals Resolved The Questions Presented For Review By Following Binding Circuit Precedent

California contends (Opp. 3-4) that this Court's practice of declining to review questions that were not decided by the lower court weighs against granting certiorari in this case. That practice – which is discretionary in any event, *see, e.g.*, *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) (per curiam) ("declin[ing] to address" claims that did "not appear to have been sufficiently developed

below"), as California concedes (*see* Opp. 4) – does not apply here because the court of appeals reached and decided the questions presented in this petition, by following binding circuit precedent.

The Ninth Circuit panel that heard this case was bound by that circuit's prior decision in *California v. NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004) (Pet. App. 33a-49a). *See, e.g., United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005) (panel cannot overrule decisions of prior panels). The *NRG Energy* panel had rejected Powerex's FSIA claim, reaching and resolving against Powerex both of the questions presented in this petition. *See* Pet. App. 46a-48a. Additionally, the *NRG Energy* court held that the denial of a defendant's assertion of foreign-state status under the FSIA is reviewable on appeal. *See id.* at 42a. In this case, the court of appeals did not question that it would have possessed appellate jurisdiction to examine Powerex's status as a foreign sovereign as it had in *NRG Energy*. That point was fully briefed by Powerex to the court in response to its order to show cause why the appeal should not be dismissed.

California is therefore incorrect to assert (Opp. 4-6) that the court of appeals' decision was based on the general rule that an appellate court lacks jurisdiction under § 1447(d) to review an order of remand. Such a conclusion would have conflicted impermissibly with the binding precedent of *NRG Energy*. California makes no attempt to justify its presumption that the panel here cavalierly transgressed prior circuit authority without comment.

The only plausible interpretation of the court of appeals' brief order in this case is that the panel considered Powerex's contentions under the FSIA, but believed that those arguments had been foreclosed by *NRG Energy*'s conclusion that Powerex was not entitled to remove under that statute. Because the court found that the legal issues presented in this case had been resolved in *NRG Energy*, there was no live substantive issue separable from the remand order over which the panel could have

jurisdiction. Necessarily encompassed within the Ninth Circuit order dismissing the appeal, therefore, was the court's refusal to revisit the *NRG Energy* court's erroneous holding that Powerex is not a foreign sovereign. The Ninth Circuit's dismissal of this appeal was therefore based on its decision to adhere to *NRG Energy*'s rejection of Powerex's claim of foreign-state status under the FSIA, not on the general bar to appellate review in § 1447(d).

B. The Court Of Appeals Had Jurisdiction Over Powerex's Appeal

1. California also incorrectly asserts (Opp. 5-6) that this Court cannot review the FSIA rulings in this case because they accompanied an order of remand. In so asserting, California relies on § 1447(d), which codified the general rule that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). The Ninth Circuit correctly concluded in *NRG Energy* that § 1447(d) does not prevent appellate review of a district court's resolution of a removing party's claim to foreign-state status under the FSIA. *See* Pet. App. 46a-48a.

Under this Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), legal determinations that "precede[]" an order of remand "in logic and in fact" and that are "conclusive" can be reviewed on appeal, despite the general rule barring appellate review of remand orders. *Id.* at 143. A conclusion that a foreign entity is not an "instrumentality of a foreign state" under the FSIA fits the *City of Waco* criteria for two reasons. First, the FSIA confers "particularized procedural" rights on foreign sovereigns beyond jurisdiction, including extended time to answer a complaint, protections against default, limitations on remedies, special venue rules, and the right to a non-jury trial before a federal judge. *See USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); 28 U.S.C. §§ 1391(f), 1441(d), 1608(d)-(e), 1609. Consequently, the rejection of an FSIA claim has "independent

relevance in adjudging the rights of the parties," *Powers v. Southland Corp.*, 4 F.3d 223, 227-28 (3d Cir. 1993), and therefore "precede[s]" the decision to remand, *City of Waco*, 293 U.S. at 143.

Second, denial of foreign-state status under the FSIA is "functionally unreviewable in state court[]," *Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 946 (9th Cir. 2004) (internal quotation marks omitted), because the state court on remand is not empowered to afford a foreign entity any of the procedural and jurisdictional protections to which it is entitled under the FSIA. Such denials are therefore "conclusive" under *City of Waco*, 293 U.S. at 143.

Accordingly, the rejection of an FSIA claim is a conclusive legal ruling preceding the decision to remand that can be reviewed on appeal consistent with § 1447(d).[1] Notably, California does not deny that Powerex properly preserved the question of its foreign-sovereign status in this case, that it properly preserved its challenge to the Ninth Circuit's erroneous holding in *NRG Energy*, and that Powerex would be able to remove this case to federal court if this Court were to reverse the Ninth Circuit.[2]

2. More importantly for the Court's consideration of this petition, the existence of that issue of appellate jurisdiction does not provide a reason for denying certiorari. If anything, it provides an additional reason to grant this petition, because the question independently merits this

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[1] Because the FSIA ruling is reviewable on appeal under *City of Waco* and is therefore not "within the bounds of § 1447(c)," *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam), it is irrelevant that the district court cited lack of jurisdiction in deciding to remand the case *after* it had resolved the FSIA question. *See* Pet. App. 14a-15a. *Gravitt* is thus inapposite.

[2] In No. 05-1068, the California Department of Water Resources ("CDWR") likewise filed suit in state court. A demurrer hearing is scheduled for June 1, 2006, at which point either the case will be dismissed and presumably appealed by CDWR or Powerex will be forced to litigate in state court – the very circumstances the FSIA was enacted to prevent.

Court's review. As noted in the Opposition in No. 05-85 (at 4), the courts of appeals are in conflict over the appealability of denials of FSIA claims that accompany remand orders. *Compare* Pet. App. 46a-48a *with*, *e.g.*, *Linton v. Airbus Indus.*, 30 F.3d 592 (5th Cir. 1994).

Further, the issue is an important one: the way in which federal courts treat FSIA claims has a significant effect on this country's foreign trade and international relations, as evidenced by the *amicus* briefs that Canada and the Province of British Columbia have filed urging this Court to grant certiorari and to reverse the Ninth Circuit's decision in *NRG Energy*. The lack of a uniform national rule permitting foreign entities that are denied the right to remove under the FSIA and to obtain appellate review threatens international comity. A single federal district judge should not have unreviewable authority to deny a foreign entity its right under the FSIA to a bench trial in federal court and to subject that entity to a jury trial in state court, particularly where a plaintiff in a subsequent suit against that entity might contend that the judge's ruling should be given issue-preclusive effect.

Although the Court need not feel obliged to resolve the important circuit conflict regarding the appealability of FSIA rulings that accompany remand orders, this case would provide the Court with an excellent opportunity to do so if it wished. In two cases this Term,[3] this Court has recognized the importance of providing clarity to issues addressing the appealability of remand orders. Those cases, however, will have no bearing on the appealability of FSIA rulings raised in this case. Because the issues

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[3] First, this Court has granted certiorari and will hear oral argument on April 24, 2006, in *Kircher v. Putnam Funds Trust*, No. 05-409, which involves the appealability of remand orders under the Securities Litigation Uniform Standards Act of 1998. Second, the Court has invited the Solicitor General to file a brief expressing the views of the United States in another case raising a question regarding the appealability of remand orders. *See* Order, *Davis v. International Union, UAW*, No. 05-107 (U.S. Dec. 5, 2005).

involved in this case implicate foreign-affairs concerns – foreign sovereigns litigating in United States courts are entitled to jurisdictional and procedural protections that the Ninth Circuit has denied Canada and its provincial organs in these cases – this Court should be especially reluctant to accept California's rationale of using the general rule restricting the appealability of remand orders as an excuse not to review the important FSIA questions presented here.

C. Subsequent State Court Proceedings Have Not Rendered This Case Moot

California offers a baseless assertion (Opp. 6-8) that the state trial court's dismissal of California's suit after remand has rendered this case moot. Dispositively, California concedes (Opp. 7 n.1) that it is appealing the state trial court's decision. Consequently, both parties retain "a continuing interest" in this litigation. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000). If California were to prevail in its appeal, then all of the harms of protracted litigation in state court that gave rise to the FSIA would come to fruition. And, even without those immediate harms, Powerex faces substantial possible prejudice by having to litigate against the State in a state court proceeding where the allegations are that Powerex charged excessive prices for electricity to public utilities in the State and to the State itself (the California Department of Water Resources). California therefore overstates the situation in asserting that the case is now moot.

If Powerex is correct that the federal courts do have subject-matter jurisdiction over the lawsuits launched by the California parties against it, this Court's reversal of the Ninth Circuit will result in the return of this case to federal court. There is therefore no basis for California's argument against certiorari.

* * * * *

Although this case comes to this Court in a somewhat unusual posture, that does not diminish the importance of the questions for this Court's review. The Ninth Circuit could not have been clearer that it will never again revisit its erroneous holding in *NRG Energy* that Powerex is not a foreign sovereign, and *NRG Energy* has for all intents and purposes become moot through no fault of Powerex's. Powerex should not be denied this Court's review in such circumstances. This case and No. 05-1068 bring the FSIA status issue particularly to the fore, because the California parties specifically brought these suits in state court so that they could gain an advantage by asserting wrongful acts against a foreign entity in litigation brought by the State.[4] Yet avoiding such prejudicial effects was precisely why Congress afforded the procedural protections of the FSIA to foreign sovereigns even when they could not claim substantive immunity from suit.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Alternatively, the petition in No. 05-85 should be granted and the Ninth Circuit's decision in that case vacated under *Munsingwear*.[5] If the Court issues a *Munsingwear* order

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[4] Even though this Court has called for responses to Powerex's petitions in Nos. 05-85 and 05-584, California recently waived response in No. 05-1068. On remand in the state trial court, Powerex recently filed a demurrer.

[5] A live controversy continues to exist in No. 05-85. The state trial court has not finally approved the Reliant settlement, and there are several objections to that settlement. The next state court hearing is scheduled for April 28, 2006. Although FERC initially approved the Reliant settlement, *see* Order on Settlement Agreement, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 113 FERC ¶ 61,308 (Dec. 22, 2005), petitions for rehearing remain pending before FERC, which has issued an order extending the statutory period for consideration of those requests, *see* Order Granting Rehearing for Further Consideration, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, Docket Nos. EL00-95-171 *et al.* (Feb. 22, 2006). Although the prospect of mootness might otherwise make No. 05-85 a less ideal

in that case, it should grant, vacate, and remand in this case with instructions to reconsider Powerex's foreign-sovereign status in light of the *amicus* briefs filed by Canada and British Columbia.

Respectfully submitted,

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vehicle for this Court's resolution of the issues, this case does not present such concerns. The appropriate course, therefore, would be either to vacate No. 05-85 for mootness and give Powerex an opportunity to obtain reconsideration by the Ninth Circuit in this case, or to grant this case and to hold No. 05-85 pending resolution of this case or until No. 05-85 becomes moot, whichever occurs first.